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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/735,978	12/15/2003	Mark Steven Franke	KCC 4972 (17,515A)	4244
45736 7590 09/16/2008 Christopher M. Goff (27839) ARMSTRONG TEASDALE LLP ONE METROPOLITAN SQUARE SUITE 2600 ST. LOUIS, MO 63102			EXAMINER HAND, MELANIE JO	
			ART UNIT 3761	PAPER NUMBER
			NOTIFICATION DATE 09/16/2008	DELIVERY MODE ELECTRONIC

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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*Ex parte*

MARK STEVEN FRANKE, KRISTI JO BRYANT,  
CYNTHIA HELEN HENDREN, RICHARD JOSEPH KAMPS,  
DAVID ARTHUR KUEN, LISA NICKEL,  
KATHERINE CAROL WHEELER, and YEE YANG

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Appeal 2008-4589  
Application 10/735,978  
Technology Center 3700

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Decided: September 12, 2008

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Before DONALD E. ADAMS, ERIC GRIMES, and FRANCISCO C.  
PRATS, *Administrative Patent Judges*.

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**DECISION ON APPEAL**

This is an appeal under 35 U.S.C. § 134 involving claims to an absorbent garment. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

## STATEMENT OF THE CASE

Claims 1-25 are pending and on appeal (App. Br. 2). Claim 1, the only independent claim on appeal, is representative and reads as follows:

1. An absorbent garment for personal wear about the wearer's waist, said absorbent garment comprising:
  - a garment shell configured for encircling the wearer's waist and having a front waist region, a front waist end at said front waist region, a back waist region and a back waist end at said back waist region; and
  - an absorbent assembly disposed within the garment shell and constructed to take in and retain body exudates released by the wearer, the absorbent assembly having an inner surface adapted for contiguous relationship with the wearer's body, an outer surface, a front waist region in opposed relationship with the front waist region of the garment shell, a back waist region in opposed relationship with the back waist region of the garment shell, a crotch region extending longitudinally between and interconnecting the front waist region of the absorbent assembly and the back waist region of the absorbent assembly, a front waist end and a back waist end, the absorbent assembly being releasably and refastenably attached generally at its front waist end to the garment shell generally at the front waist end of the garment shell, said absorbent assembly also being releasably and refastenably attached generally at its back waist end to the garment shell generally at the back waist end of the garment shell such that the absorbent assembly is selectively detachable from and reattachable to the garment shell.

The Examiner cites the following documents as evidence of unpatentability:

Rosch et al.	US 6,115,847	Sep. 12, 2000
Christoffel et al.	US 2002/0087137 A1	Jul. 4, 2002

Claims 1-25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosch in view of Christoffel (Ans. 3-6).

### OBVIOUSNESS

#### *ISSUE*

The Examiner cites Rosch as disclosing “an active wear trunk garment 110 having a liquid-permeable trunk cover 114 . . . [with] waste containment structure 142 [which] is disposed generally within trunk garment 110” (Ans. 3). The Examiner concedes that “Rosch teaches that trunk cover 114 is joined to elastic members 143,145 at the waist regions” and that “therefore Rosch does not teach that trunk cover 114 is refastenably attached at the front and rear waist regions” as recited in claim 1 (*id.*).

The Examiner cites Christoffel to meet that limitation (*id.*). Specifically, the Examiner cites Christoffel as disclosing a girl’s swimsuit that has an “absorbent pant/bottom portion 98 [which] is releasably attached to the upper portion/bodice 42 at the front and rear waist areas via hook and loop fasteners 92 to secure the pant portion and upper portion about the waist of the wearer and for greater ease in applying and removing said swimsuit” (*id.* at 3-4 (citing Christoffel [0071]-[0074])). Based on these teachings the Examiner concludes that one of ordinary skill in the art would have considered it obvious to use hook and loop fasteners to releasably and refastenably attach “outer cover 114 and garment 110 taught by Rosch at their respective front and rear waist ends so as to more easily apply and remove garment 110 as taught by Christoffel, such that the absorbent assembly taught by Rosch is selectively detachable from and reattachable to the garment shell” (*id.* at 4).

Appellants contend that the Examiner has not made a prima facie case that one of ordinary skill in the art would have considered claim 1 obvious in view of Rosch and Christoffel (*see* App. Br. 4-8). Specifically, Appellants contend that Christoffel's use of releasable and refastenable attachments to make a single-use disposable girl's swimsuit easier to apply and remove, as opposed to making the waste-absorbing component of the suit reattachable, would not have prompted one of ordinary skill in the art to make the waste-collecting assembly of Rosch's garment releasable and refastenable to the garment shell (*id.* at 8).

The issue with respect to this rejection, then, is whether the Examiner has made a prima facie case that one of ordinary skill in the art would have considered the garment recited in claim 1, which has an outer shell and an inner absorbent assembly releasably and refastenably attached to the front and rear waist portions of the outer shell, obvious in view of Rosch's disclosure of an active wear trunk having an inner absorbent assembly non-releasably and non-refastenably attached to the waist of the outer shell, in combination with Christoffel's disclosure of a disposable girl's bathing suit that uses releasable and refastenable attachments for ease of applying and removing the suit.

*FINDINGS OF FACT ("FF")*

1. Rosch discloses "a disposable garment that may be adapted to provide containment and absorbency of waste matter while being useful as active and swim wear" (Rosch, col. 1, ll. 8-10).
2. One embodiment of Rosch's garment is a "trunk" that has an outer shell, or "trunk cover" 114 (Rosch, col. 9, ll. 60-61), and an inner "pant structure" 112 (*id.* at col. 10, ll. 26-27), with a "waste containment structure"

142 (*id.* at col. 13, ll. 20-21) disposed within the inner pant structure 112 (*see* Figures 4 and 5).

3. Regarding the attachment of the outer trunk cover 114 to the waste absorbent-containing inner pant structure 112, Rosch discloses that “[t]he waist elastic members **143** and **145** [of the inner pant structure] may be stretch bonded to the waist regions **131** and **133** of the trunk cover **114** or bonded in a relaxed state to a gathered portion the waist regions **131** and **133** of the trunk cover **114**” (Rosch, col. 10, ll. 33-36; *see also* Figure 4).

4. Regarding the attachment of the outer trunk cover 114 to the waste absorbent-containing inner pant structure 112, Rosch also states:

The waist regions **131** and **133** and the waist elastic members **143** and **145** are desirably bonded together by adhesives, however other methods of bonding discussed above can be utilized. The waist regions **131** and **133** of the trunk cover **114** may be attached to the waist elastic members **143** and **145** around the entirety of the waist opening **134** or only a portion thereof.

(Rosch, col. 10, ll. 42-49.)

5. Rosch discloses:

[A] number of modifications and changes may be made without departing from the spirit and scope of the present invention. For instance, alternative or optional features described as part of one embodiment can be used to yield another embodiment. Additionally, only one rather than both ends of the waste containment structure can be elastically connected to the cover.

(Rosch, col 16, ll. 59-65.)

6. Christoffel discloses:

A disposable, one-piece swimsuit for girls includes a bodice attached to a chassis. The bodice is designed to provide upper torso coverage while the chassis can include absorbent and

containment features. The upper torso coverage contributes to social decency and also protects the wearer's skin against excessive exposure to the sun. The absorbent and containment features can either be integrated within the chassis or can be in the form of a separate, pant-like, absorbent garment covered by the chassis.

(Christoffel, abstract.)

7. Christoffel discloses that its swimsuit “is disposable, such that it can be worn for a limited time, until the garment is soiled or for the duration of the wearer's water activities” (Christoffel [0006]).

8. Christoffel discloses that in one embodiment of its swimsuit “[a] refastenable fastening system **92**, such as a hook and loop fastener, can be applied to the front region **44** of the bodice **42** along the waist region **24** and to the front region **28** of the chassis **22** along the waist region **24**, such that the bodice **42** and the chassis **22** can be releasably engaged to one another” (Christoffel [0071]; *see also* Figures 18 and 19).

9. Christoffel discloses another embodiment of its swimsuit in which “the chassis **22** is a pant-like absorbent product **98** and is attached to the bodice **42**” (Christoffel [0072]; *see also* Figures 21 and 22). Regarding this embodiment, Christoffel discloses that “either elastic bands or strings or other forms of refastenable fastening systems **92** can be used at the sides of, or around the back of, the wearer's mid-torso region to secure the bodice **42** about the wearer's mid-torso” (*id.*).

10. Christoffel discloses:

In each of the embodiments of the invention, a refastenable fastening system **92** can be included for greater ease in applying and removing the swimsuit **20**. For example, the front strap portion **68** can be releasably attached to the back

strap portion **70** using a refastenable fastening system **92**, such as a hook and loop fastener, as shown in **FIG. 21**.

(Christoffel [0073].)

11. Christoffel discloses:

[I]n each of the embodiments of the invention, bonding between the bodice **42** and the chassis **22**, and/or between front and back regions **44, 46, 28, 30** of the bodice **42** and chassis **22**, can be accomplished using attachment means known to those skilled in the art such as adhesive, thermal or ultrasonic bonding.

(Christoffel [0074].)

#### *PRINCIPLES OF LAW*

In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art. “[The Examiner] can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references.”

*In re Fritch*, 972 F.2d 1260, 1265 (Fed. Cir. 1992) (citations omitted, bracketed material in original).

Emphasizing a flexible approach to the obviousness question, the Supreme Court has nonetheless similarly noted that “it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements *in the way the claimed new invention does* . . . because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.” *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007) (emphasis added); *see also*



*id.* at 1740-41 (requiring a determination of “whether there was an apparent reason to combine the known elements *in the fashion claimed* by the patent at issue”) (emphasis added).

Thus, ultimately, “[i]n determining whether obviousness is established by combining the teachings of the prior art, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *In re GPAC Inc.*, 57 F.3d 1573, 1581 (Fed. Cir. 1995) (internal quotations omitted).

#### *ANALYSIS*

We agree with Appellants that the Examiner has not made a *prima facie* case that claim 1 would have been obvious to one of ordinary skill in the art in view of Rosch and Christoffel.

We note that Rosch discloses that the inner waste-absorbing component of its disposable garment can be attached at only the front or rear of the cover (FF 5), and that the inner portion of the garment can be attached at a portion of, rather than the entire waistband (FF 4). We also note that Christoffel discloses the use of releasable and refastenable attachment means for connecting the upper and lower outer portions of a disposable swimsuit (FF 9), and that using releasable and refastenable attachment means in such a manner can make the disposable swimsuit easier to apply and remove (FF 10).

However, entirely opposite to claim 1, Rosch teaches that the inner waste absorbent-containing portion of its garment should be attached to the outer cover using non-releasable and non-refastenable attachments (FF 3). Moreover, both Rosch and Christoffel disclose that their garments are disposable, and therefore intended essentially for a single use (*see* FF 1, 7).

Because the entire assemblies of the swimsuits of both references are intended to be disposed of after a single use, we do not agree with the Examiner that Christoffel's disclosure, that releasable and refastenable attachments render a girl's disposable swimsuit easier to apply and remove, would have prompted one of ordinary skill in the art to render the inner waste-absorbing assembly of Rosch's garment releasable and reattachable to the outer cover. Rather, given the disposable nature of Rosch's garment, we agree with Appellants that the references do not suggest any advantage that might be gained by providing Rosch's suit with releasable and refastenable attachments between the outer cover and the inner waste-absorbing assembly.

The Examiner argues that Christoffel's disclosure of using releasable and refastenable attachments between the torso-covering bodice and lower body-covering chassis portion of its suit shows that Christoffel's suit is not necessarily intended for a one-time use (Ans. 7). The Examiner urges that Christoffel therefore provides impetus for providing releasable and refastenable attachments between the outer cover and inner waste-absorbing portions of Rosch's suit, so as to make it easier to remove (*see id.*).

We are not persuaded by these arguments. Christoffel explicitly discloses that its swimsuit "is disposable, such that it can be worn for a limited time, until the garment is soiled or for the duration of the wearer's water activities" (Christoffel [0006] (FF 7)).

We note that one of ordinary skill might reason that the releasable and refastenable attachments between the upper and lower portions of Christoffel's suit would allow for replacement of a soiled lower portion with a fresh waste-absorbing assembly. However, claim 1 recites a garment in

which an inner waste-absorbing assembly is removable from and reattachable to an outer cover.

We do not agree with the Examiner that Christoffel's separation and reattachment of an upper and lower portion of a disposable swimsuit teaches or suggests claim 1's limitation of a garment in which an inner waste-absorbing assembly is removable from and reattachable to an outer cover. Moreover, we do not see, and the Examiner has not explained, how changing the essentially permanent attachments between the inner and outer components of Rosch's swimsuit to releasable and refastenable attachments would render the swimsuit easier to put on, or to remove.

Thus, we agree with Appellants that the Examiner has not made a prima facie case that one of ordinary skill in the art would have considered the product recited in claim 1 obvious in view of Rosch and Christoffel. We are therefore compelled to reverse the Examiner's obviousness rejection of claim 1 and its dependent claims over Rosch and Christoffel.

#### SUMMARY

We reverse the Examiner's rejection of claims 1-25 under 35 U.S.C. § 103(a) as being unpatentable over Rosch in view of Christoffel.

#### REVERSED

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